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September 17, 2013

Via ECFS

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Room TW-A325  
Washington, DC 20554

Re: Notice of Ex Parte Presentation  
CG Docket No. 02-278

Dear Ms. Dortch:

On September 13, 2013, Glenn Richards and Lauren Lynch Flick of Pillsbury Winthrop Shaw Pittman LLP, counsel to YouMail, Inc. (“YouMail”), along with Alex Quilici, Chief Executive Officer of YouMail, met with Suzanne Tetreault, Marcus Maher, and Diane Griffin Holland of the Office of the General Counsel, and Mark Stone, Kurt Schroeder, John B. Adams, Lynn Follansbee, and Sara Kuehnle of the Consumer and Governmental Affairs Bureau to discuss the YouMail Petition for Declaratory Ruling (“Petition”), filed April 19, 2013, concerning YouMail’s advanced voicemail system and the Telephone Consumer Protection Act (“TCPA”).

In the meeting, YouMail discussed the four functions that the YouMail virtual assistant handles for subscribers -- greeting callers personally, rejecting telemarketers and stalkers, transcribing voicemails, and replying to voicemails via an auto-receipt text message (which is the feature subject to the TCPA lawsuits). YouMail described the benefits that the auto-receipt text message feature provides to the caller. Specifically, it a) allows the caller to confirm they have reached the correct party and left an intelligible voice mail message; b) explains to the caller why the YouMail user did not answer the call (e.g., on a plane or low battery); and c) allows the caller to enter their preferred contact information into the YouMail user's contact list to facilitate future communications.

YouMail displayed the auto-receipt that callers receive on their cell phones when that function is enabled. The auto-receipt is optimized for the mobile environment and contains only the information that the mobile user needs. It provides multiple ways for callers to opt out of receiving auto-receipts from not only the YouMail user they called, but also from all YouMail users. There is also a link provided if the caller chooses to download the YouMail application for themselves. This is provided as a convenience to those recipients who would prefer to use the app, rather than the mobile website, for an enhanced user experience. YouMail also explained that screen shots presented to the Commission by commenter Gold were from the YouMail website and not representative of what callers would see in auto-receipts.

YouMail also provided information regarding the popularity of the auto-receipt among YouMail users and recipients. Only .4% of recipients have opted out. Less than one in one million have ever contacted YouMail about the auto-receipts, and most of these were requests for additional information.

Finally, YouMail demonstrated the options which the individual YouMail user has over the sending of auto-receipts.

YouMail explained that its service does not have the capacity to “store or produce telephone numbers to be called using a random or sequential number generator” and dial those numbers, which is the definition of an automatic telephone dialing system (“ATDS”) under the TCPA. The YouMail service only responds to an in-bound attempt to contact the YouMail subscriber. It does not initiate the communication. Moreover, YouMail explained that the service could not be re-engineered to incorporate this capability without being completely and fundamentally rebuilt. YouMail explained that the statutory definition, through the use of the present tense “has,” mandates that the capacity to randomly and sequentially dial numbers be a **current** capacity, not a potential future capacity. YouMail explained that the overly broad definition advocated by other commenters reads the concept of random and sequential dialing out of the statute and is wholly inappropriate in light of today’s modern communications technology. Under this overly broad interpretation, any telephone with a call log is an ATDS. This is particularly problematic because the statutory prohibition is against any person making a call using an ATDS. Therefore, all calls made using a cell phone are prohibited.

Moreover, if such a broad interpretation of ATDS is accepted, then consumers clearly and expressly consent to the use of ATDS equipment. Consumers use cell phones to place calls and send texts, and they rely on others to use the same technology in response. In using an “ATDS,” to make a call, the calling party understands that the functionality exists that permits the called party to respond by text and expressly consents to its use. This is necessarily so or all modern

communications would be prohibited under the TCPA, which was not Congress' intent.

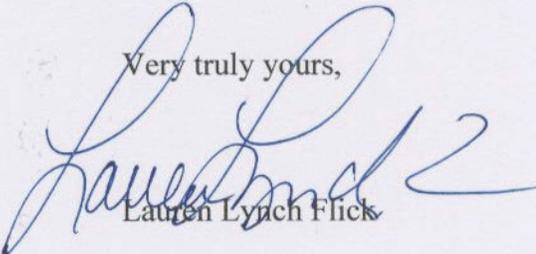
The YouMail service does not decide what number to dial or when to dial it. Rather, it merely responds to individual callers based on the instructions in the YouMail subscriber's account. Given that consumers can and do send text messages responding to in-bound telephone calls, it defies logic to argue that they cannot use an application that does the very same thing.

Finally, YouMail explained that the TCPA class action lawsuits have placed an enormous financial burden on the company, hindering its ability to obtain additional financing to retain employees or grow the business, and even impacting the company's owners and directors, who have been personally named as defendants. This poisonous, litigious environment can only deter entrepreneurs and slow the growth of mobile applications in the United States.

For all those reasons, YouMail urged the Commission to expeditiously grant its Petition, and find that its service is not an ATDS under the TCPA, that callers to YouMail users consent to auto-receipts sent by the user and that YouMail does not send the auto-receipts, but instead acts as an intermediary between its users and their callers.

This notice is being filed electronically in the above docket, pursuant to Section 1.1206(b) of the Commission's rules. A copy of the presentation made by YouMail is attached.

Very truly yours,



Lauren Lynch Flick

cc: Suzanne Tetreault  
Marcus Maher  
Diane Griffin Holland  
Mark Stone  
Kurt Schroeder  
John B. Adams  
Lynn Follansbee  
Sara Kuehnle

# YouMail

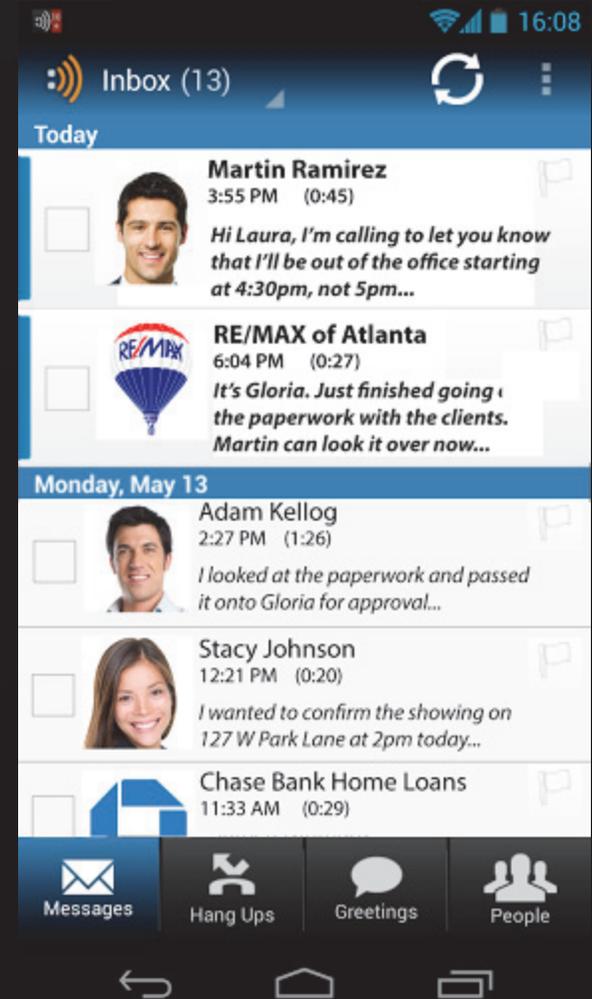
September, 2013

Alex Quilici, CEO

- 1) Service description
- 2) Legal issues
- 3) Impact and summary

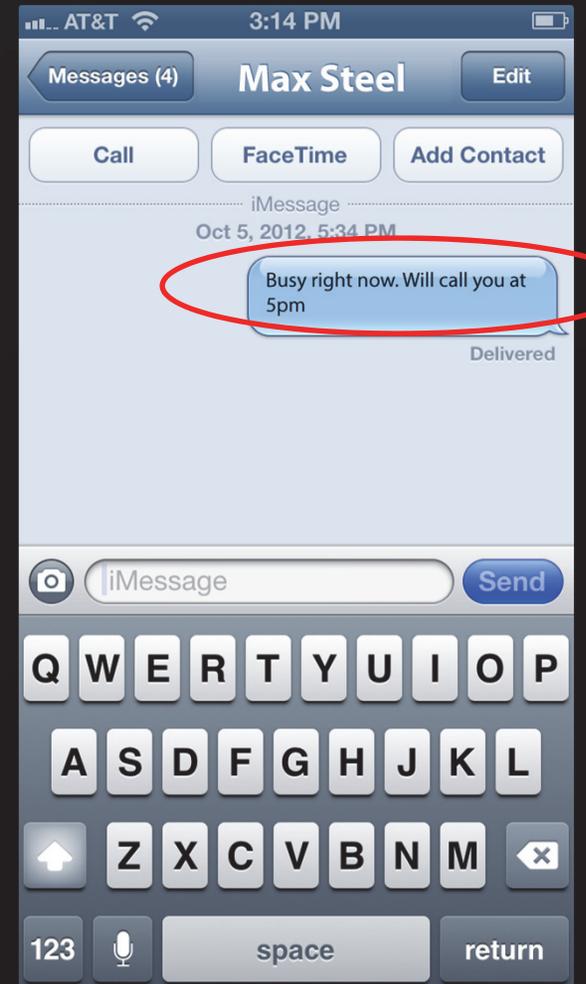
# YouMail Replaces Voicemail With A Digital Secretary

- Over 5 million YouMail users.
- YouMail is their answering service to handle calls they can't:
  - Greets callers by name or with personal greeting.
  - Rejects telemarketers and stalkers.
  - Transcribes voicemails.
  - **Replies to voicemails (subject of TCPA lawsuits)**



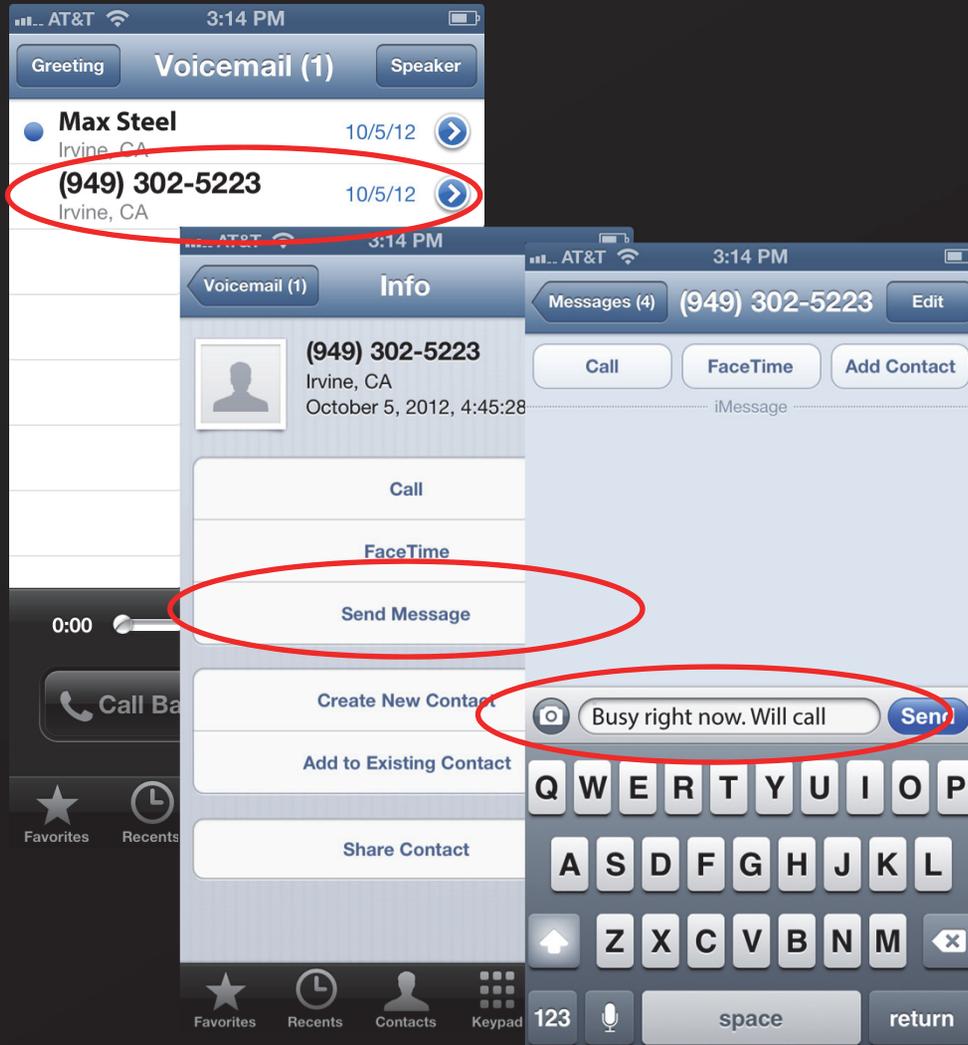
# Some History Behind "Auto-Reply"

Replying to calls can be a lot of effort...



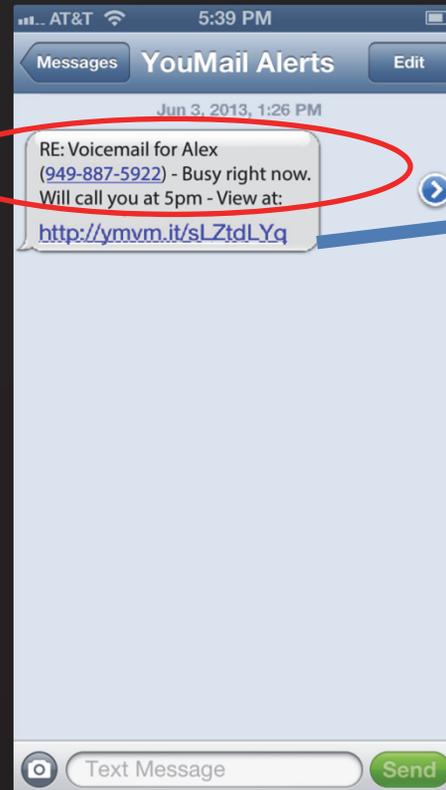
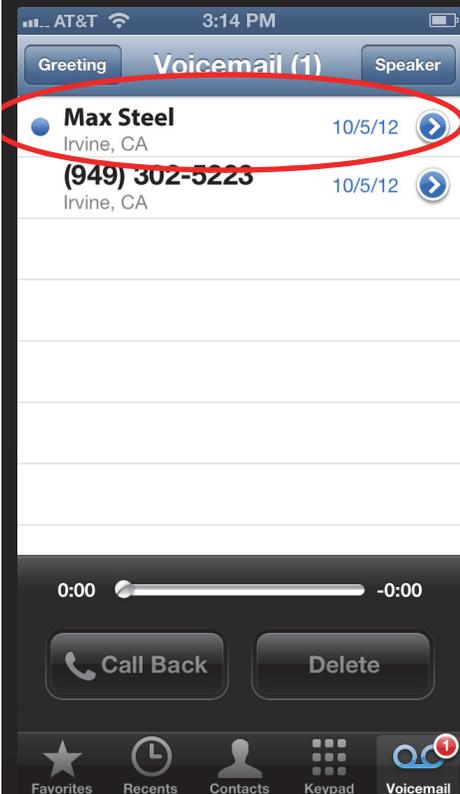
# Some History Behind "Auto-Reply"

...that is repeated for each caller.

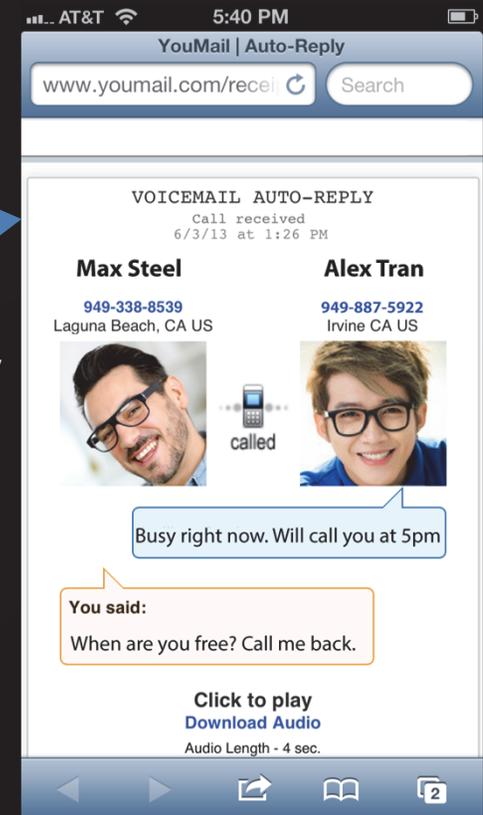


# A Better, Simpler Way

Set up reply once, and each caller gets an immediate auto-reply



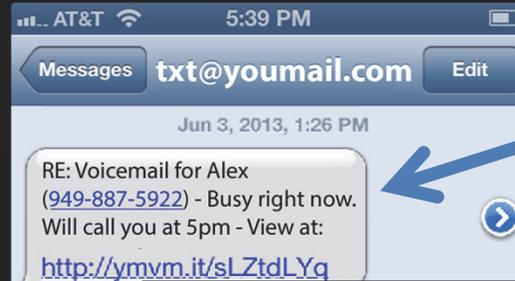
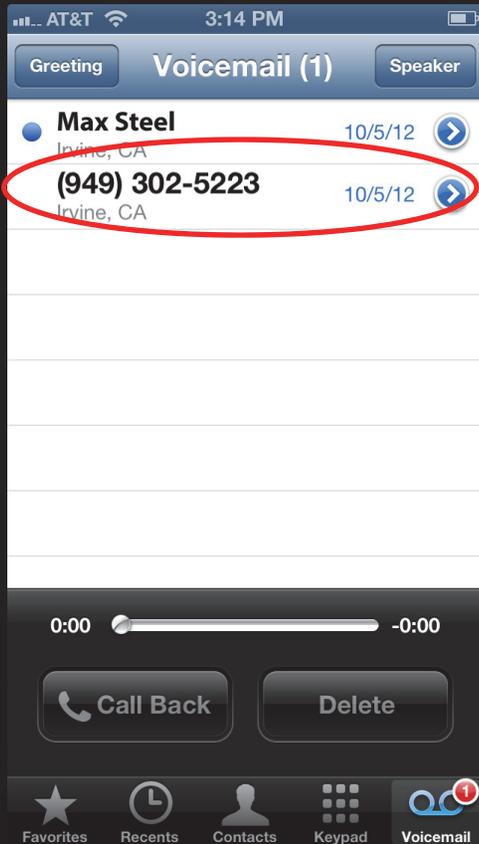
Link to  
Auto-Reply  
Mobile  
Web Page



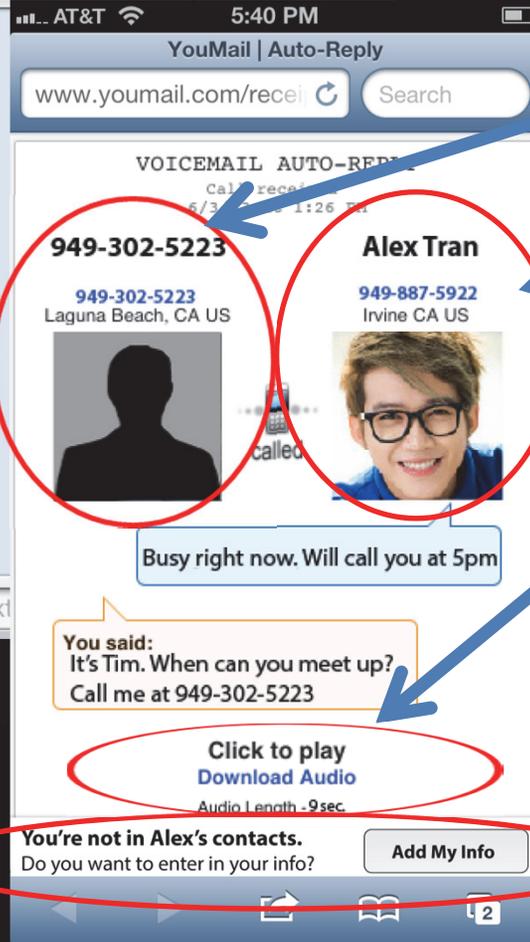
- Works even when phone off (dead battery).
- Easier to change than recording greeting(s).

YouMail:)))

# Numerous Caller Benefits



Know why couldn't answer



See how they appeared.

Verify called party

Verify/save voicemail

Update address book



# Users Control Caller Experience

- Completely customizable:

- Who
- When
- How
- What's in txt.
- What's on page.

- Sensible defaults.

- User notice/education.

When would you like to send an auto-reply to your callers?

	My Contacts	Everyone Else
They Leave A Voicemail	Always	Always
They Don't Leave A Voicemail	Never	Never

Send Replies By  TXT  E-Mail

What would you like included in each auto-reply?

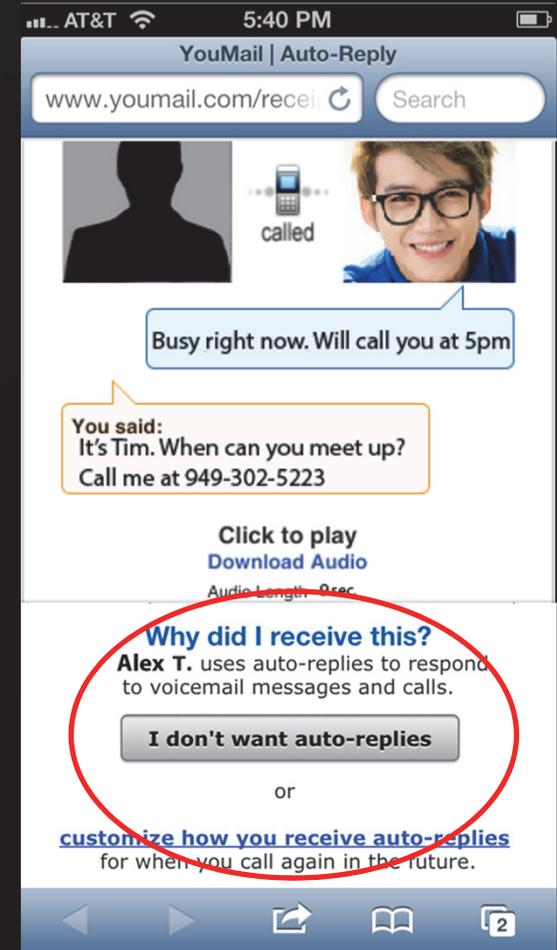
- Show your last name (uncheck for privacy)
- Include the following custom message:
- Include a link to the extended information page at <http://ymvm.it/xxxx>

How would you like to customize the page that auto-replies link to?

- Encourage unknown callers to identify themselves
- Include my e-mail address  on this page
- Include my website URL (set your website URL) on this page
- Include instructions about how to download YouMail

# Callers Overwhelmingly Value This

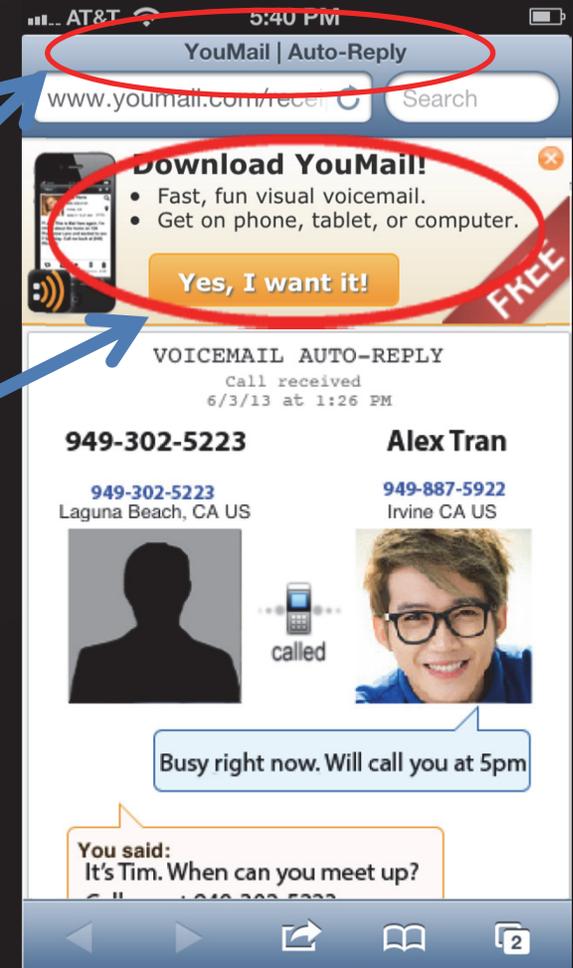
- Easy opt-out (from **any** YouMailer).
  - Reply “stop”.
  - “I don’t want auto-replies”.
- Massively positive reaction:
  - ~75m sent to ~25m people.
  - ~6% customized.
  - < .4% ultimately opt-out.
  - < 25 contacted us (<1 in 1m) .
- No opposition from consumer groups, and supported by CTIA.
- Plaintiffs manufacturing issue:
  - Gold had ongoing texting/calling relationship with the person (her lawyer) who auto-replied to her.



# YouMail Is NOT Telemarketing

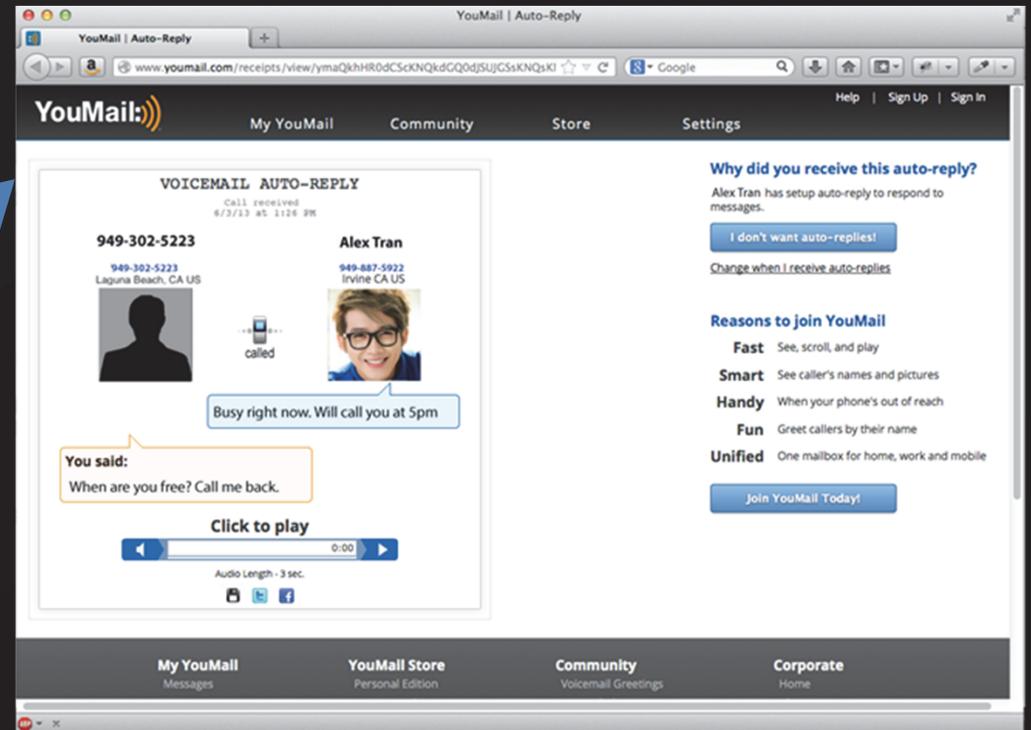
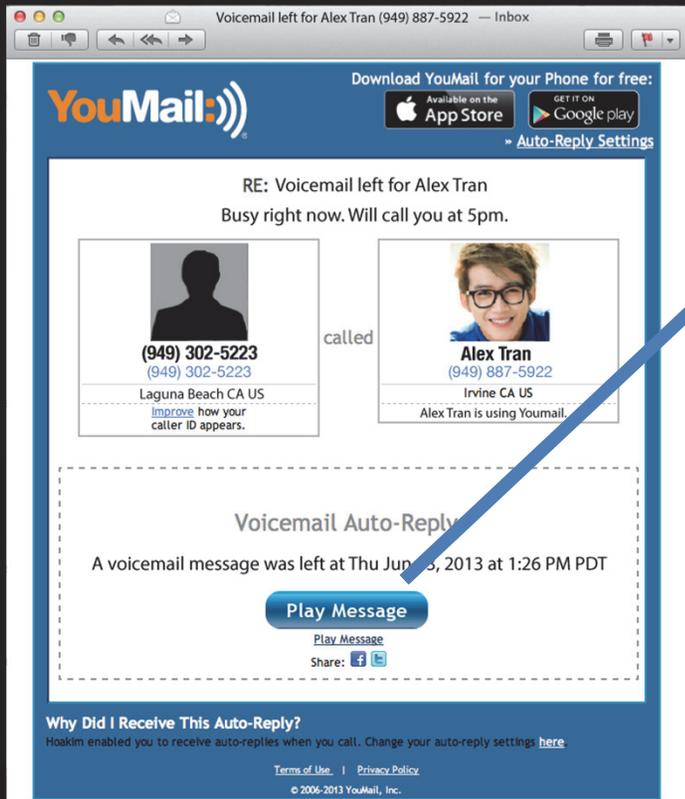
(even though that is not relevant to TCPA)

- Auto-Reply Text
  - Doesn't mention YouMail.
  - Doesn't always link to web page.
- Mobile Web Page
  - Mentions YouMail, which is critical consumer info.
  - Shows how visitor can get YouMail, which is standard, expected behavior of mobile web sites.
  - Together stops "How do I do this?" follow up calls.
- Users and callers control what they see.



YouMail:)))

# Gold Misrepresents YouMail Behavior (showed irrelevant “desktop” view of “e-mail reply”)



# Legal Issues

- YouMail is not an ATDS
- “Calling” is consent to be called back.
- YouMail does not place or initiate call.

# YouMail is not an ATDS

- Statutory definition of ATDS:

“equipment which has the capacity— (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”

- 47 U.S.C. § 227(a)(1)(emphasis added)

- YouMail can't currently randomly or sequentially generate or store numbers in any way.

Certainly can't generate or store as Congress intended to prevent (e.g., 1111, 1112, 1113), and doing so would require constructing completely different software.

- Opponents' proffered interpretation (future capacity) is contrary to plain meaning and would lead to absurdity

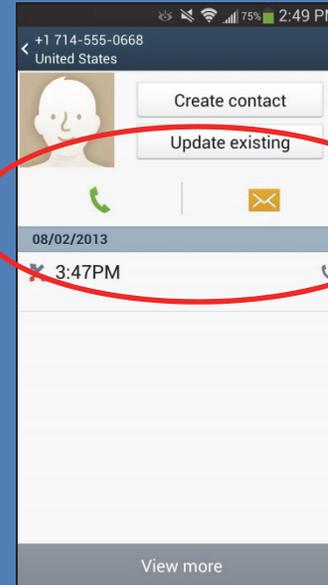
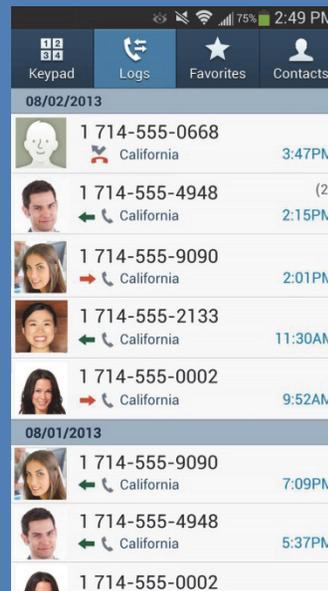
Any cell phone with call log or device capable of reprogramming would be ATDS.

# Consent

- Callers to YouMail subscribers consent to receive one-time, individual-to-individual, immediate auto-reply.

Social norms demonstrate consent: cell phone users know any missed call can be returned via text message—whether they leave message or not. YouMail auto-reply is no different (except with many consumer-friendly features)

Samsung Galaxy S3/S4 users have to explicitly decide whether to call or text someone back



# Consent

- If one consumer has consent to call or text another consumer in response to a call, then YouMail can do it for them.

Consent is a counterbalance to ATDS requirement. Opponents' arguments re: ATDS and consent cannot BOTH be right at same time. Otherwise anyone returning missed call from friend/relative/teacher without prior express consent violates TCPA.

- It simply defies common sense that:

Legal: user taps "button" after each call to reply with a text message.

Illegal: user taps "button" before calls to run an app that replies to each call with a text message.

Text and Call  
Auto-Reply



Auto Call  
Response



Missed Call  
Auto-Reply



Auto-Reply  
SMS/Calls



Auto-SMS  
Auto Responder



Safest Text  
Auto-Reply



YouMail:)))

# YouMail Does Not Place or Initiate Call

- Intermediaries of someone else's communication are exempt.

YouMail facilitates individual-to-individual communication between subscriber and caller who first initiated call.

- YouMail does not decide which number is called.

YouMail facilitates call based on original caller and subscriber settings.

- Offering consumer-friendly features does not mean YouMail "makes" call.

No more liable than phone company offering \*69 feature or VoIP call recording.

# Lawsuits Stifling Innovation

- Name directors/officers as defendants in putative class actions.
  - Potential for massive personal liability and large legal expenses.
- Significant cost of defense plus impact on capital raising.
  - Difficult to remain ongoing concern, much less grow, despite slashing staff.
- Necessitates urgent resolution.

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**DON'T MISS** SEC Investigates Herbalife Pyramid Scheme Allegations by Hedge Fund

Home > Lawsuit Investigations > YouMail Unsolicited Text Message Spam Lawsuit Investigation

## YouMail Unsolicited Text Message Spam Lawsuit Investigation

By Allen Yesilevich on February 20, 2013



Sending unsolicited and unwanted **text message** is a violation of the federal Telephone **Consumer Protection Act**, which prohibits companies from sending unsolicited text messages to users mobile phones without their consent.

Under the TCPA, consumers may receive between \$500 and \$1500 for each illegal text message sent. A **class action lawsuit** was filed against YouMail, claiming the company sent unsolicited text messages to consumers advertising the YouMail application for smart phones.

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MEMBER - THE STATE BAR OF CALIFORNIA



SITEMAP  
Attorney Profile  
Contact The Jake A. Walton

### Do Text Messages from YouMail.com Violate the TCPA?

by JAKE WALTON on MAY 31, 2013  
in SAN DIEGO TELEPHONE CONSUMER PROTECTION ACT (TCPA) ATTORNEY

If you are a San Diego County resident who has received an unwanted text message from YouMail.com you may be entitled to relief under the The Telephone Consumer Protection Act (TCPA), which bans many text messages sent to a mobile phone using an autodialer.

YouMail, Inc. is a company based in Irvine, California which provides voicemail visualization services to its subscribers. However, YouMail encourages its members to select an option to automatically send an unrequested and unauthorized "auto-reply" text message from YouMail to the consumer which contains a solicitation to become a YouMail subscriber. This business practice may be illegal because the auto-reply text message is unauthorized by the consumer, who had no way of knowing that the target of their call was a YouMail subscriber, and consumers who have received unsolicited text messages from companies like YouMail, Inc. may be able to bring suit under the TCPA for statutory damages ranging from \$500 to \$1500 **for each violation**.

For more information, [contact](#) San Diego TCPA Attorney [Jake A. Walton](#) to arrange a complimentary legal consultation.

YouMail:)))

# Summary

- YouMail's Auto-Replies:
  - Single text (optionally sent) on behalf of YouMail user, solely in response to incoming call.
  - Demonstrated high value to callers, with no actual consumer issues.
  - Not remotely what TCPA was intended to address.
- Opponents' (Gold et al.) argument is wrong and defies common sense:
  - Argues YouMail is an ATDS because it runs on general purpose hardware that somehow could have new software created to randomly/sequentially send texts.
  - Argues that social norm that cell phone user has consent to text back anyone who calls them doesn't apply to an app/service they use to do it for them.
- Looking for timely clarification that YouMail's auto-reply feature does not violate the TCPA.